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BEFORE THE

Federal Communications Commission

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WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	))))	MM Docket No. 92-266
	)	
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA"), by its attorneys, respectfully submits these Comments in response to the Further Notice of Proposed Rulemaking ("Further Notice") released March 29, 1996, in the above-referenced proceeding. MPAA represents eight leading United States producers and distributors of motion pictures and television programming.[1]

[1]MPAA member companies participating in these comments are Buena Vista Pictures Distribution, Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Turner Broadcasting System, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios, Inc.; and Warner Bros., a Division of Time Warner Entertainment Company, L.P. Sony Pictures Entertainment Inc. is not participating in these comments. Additional views of individual MPAA member companies may be expressed in separate submissions in this proceeding.

DISCUSSION

MPAA from the outset has been and remains a supporter of the concept of commercial leased access as established by Section 612 of the 1984 Cable Act. It believes the availability of such access serves as an important constraint that has been useful in the development of a healthy programming marketplace. However, just as the fact that there have been few complaints brought under Sections 616 and 628 does not establish that those provisions have failed to serve their purpose (and, indeed, suggests that a competitive market is functioning properly), the fact that programmers generally have not used the leased access option does not mean that there is a problem in the marketplace that the Commission needs to address. MPAA submits that the programming marketplace is healthy and that the Commission should not promote extensive use of leased access as a goal in and of itself. The Commission's proposed new methodology for setting leased access rates utilizes inappropriate and unambiguous subsidy to allocate cable channels under the commercial leased access rules. The victims of such subsidization are the cable operator who is forced to lease capacity at rates artificially limited to "quantitative costs," the existing cable program networks who will be displaced or repackaged, and, most importantly, the consumer whose programming preferences in the real marketplace will be ignored. The Commission's approach is misguided. Commercial leased access was not intended to be a vehicle for forcing the public to pay for programming that the marketplace has not found of sufficient value or desirability. Congress clearly intended that commercial leased access should, indeed, be <u>commercial</u> access not public access, not subsidized access, not even artificially encouraged access.

MPAA cannot define precisely what constitutes a reasonable rate for leased access; however, the FCC's current "highest implicit rate" formula represents a far more relevant surrogate for judging the value of a channel in the context of commercial leasing on cable systems. The Commission's proposal, which would institute artificially reduced channel compensation, appears based on the erroneous view that there is a need for a "significant departure" from the present formula exists since not enough cable carriage of program networks is achieved today by leased access.[2]

MPAA submits, instead, that the reasonableness of leased access rates should not be measured by whether entities choose to lease channels in the current vibrant, competitive programming marketplace. For example, MPAA's member companies have invested heavily in programming and marketing rather than use leased access to obtain cable carriage. The absence of such leased access use is no basis for concluding that rates are too high or that leased access is not fulfilling its statutory function. In truth, many programmers do not want to negotiate channel capacity on a system-by-system basis when broad coverage is needed to support high quality programming. Most importantly, the commitment of non-leasing programmers to high quality, innovative programming also requires the active marketing and promotion by the cable operator of the package of cable network services. These program services require a revenue stream provided by affiliate fees from cable operators -- a revenue stream not available in a leased access context. This proven success of the traditional carriage partnership between cable operators and many diverse national, regional and local

[2]The Further Notice states that "if the maximum rate for leased access is reasonable, the resulting demand for leased access channels will also be reasonable." Further Notice at para 28.

programmers has been sparked by marketplace forces with the leased access requirement serving primarily as a safety net. Without the use of this leasing alternative, the basic cable and premium programming marketplace has developed and continues to develop in a robust, dynamic fashion.

In addition to the erroneous FCC yardstick of measuring the success of leased access by usage alone, the underlying philosophy of the Further Notice does not match the intent of Congress. Leased access was never intended to guarantee an outlet for services not viable in the marketplace on their own merits. It is clear from the legislative history that the purpose of statutory commercial leased access simply was to provide a safety valve to ensure that program services were not unfairly foreclosed from access to cable systems.[3] Yet the Commission has made no finding that anticompetitive practices have locked out services that otherwise would have gained access, based on consumer preference or demand, in the marketplace. Indeed, the environment for programming has thrived and grown since 1984. Since then, Congress enacted Section 616 of the 1992 Cable Act and the FCC has implemented rules to promote carriage of unaffiliated services. Moreover, the requirements of retransmission consent and PEG access also provide programming services and cable networks with opportunities for access to cable systems. Finally, the specter of increased video competition has offered the further impetus to the introduction of new and diverse video programming services under a non-subsidized, non-leased approach.

A reading of the new formula for achieving leased access rates, limiting recovery by cable operators to lost opportunity costs, makes clear that the Commission views lessees

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[3]See S. Rep. No. 92, 102d Cong., 1st Sess. 32 (1992).

under leased access as simply leasing capacity on a transparent cable facility. In reality, under the Commission's proposal, commercial channel lessees would obtain the significant benefit of being placed in, and associated with, an existing, highly penetrated package of services containing many cable program networks that have achieved carriage in a more marketplace oriented manner. These programmers have invested heavily in programming, marketing, promotion, packaging and, in some instances, the actual distribution technology. Under the Commission's proposed mandatory tier position for leased channels, channel lessees also would obtain the benefit of the marketing and promotional benefits provided by the cable operator as the programming retailer.

MPAA submits that the FCC must not adopt its proposed rate methodology for cable leased access that ignores the current thriving program marketplace. Such rates should not be artificially capped based on a concept of so-called quantifiable lost opportunity costs. Demonstrating such quantifiable lost opportunity in advance is an unfair condition to being compensated fully under commercial leased access rate formula.[4] Consumers may choose to

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[4]The Further Notice tentatively concludes that a loss of existing subscribers or of potential new subscribers caused by replacing longstanding popular services with leased programming, not previously accepted by the marketplace, is too speculative to be factored into leased access rates. Further Notice at para. 86. MPAA submits that the quality, diversity and mix of programming, whether in the movie theaters or on cable systems, has a direct relationship to the interest of people willing to pay to see it. Indeed the Congress understood this concept when it established the commercial leased access requirement. It stated:

> Thus, in establishing price, terms and conditions pursuant to this section, it is appropriate for a cable operator to look to the nature (but not the specific editorial content) of the service being proposal [sic], how it will affect the marketing of the mix of existing services being offered by the cable operator to subscribers, as well as potential market fragmentation that might be created and any resulting impact that might have on subscriber or advertising revenues. H.R. Rep. No. 628, 102d Cong., 2d Sess. 51 (1992).

eliminate cable service entirely or not subscribe to current levels of service as high quality programs are displaced and remaining program networks are reshuffled and captive to the new, artificially configured packages. Moreover, as the cable operator is saddled with a significant mix of services of lower consumer preference in an environment where competitors have no such leased access obligations, the current package price will be more difficult to justify to subscribers. This will result in downward pressure on programming licensing fees and on advertising revenues and, consequently, on the overall quality of the service which is funded by such fees and revenues.

MPAA members also are concerned that an effort to subsidize rates to promote leased access will produce other severe and unintended adverse consequences. Those programmers successful in the marketplace have committed to high quality programming in order to be carried by cable systems and preferred by cable subscribers. The Commission should be well aware from its unfortunate experience in setting rates for adding new cable programming under its initial "going forward" rules that imposing restrictive government regulation affecting programming decisions can quickly impact both longstanding and fledgling services. The 10-15 percent of total activated capacity set aside for leased access will require, according to the tentative assessment of the Commission, much larger numbers of leased channels to all be carried on the highly penetrated basic or other highly subscribed-to program tier.[5] As MPAA has pointed out, this concentration of leased access

[5]Fifteen percent of total activated channel capacity for leased access may easily translate into 30-40 percent of the programming on the basic or standard tier. With the other video alternatives currently in the marketplace, the Commission cannot characterize as too speculative the significant loss of subscribers and revenue associated with drastically altering the makeup, mix and quality of a popular tier of service via leased access channels.

programming on popular tiers will represent programming that has not otherwise achieved marketplace carriage via affiliate relationships. Leased access users will be afforded artificial equality with those programmers that have responded to, heavily invested in, and developed creative new services in a competitive marketplace environment. Having made these investments, these services may now either be bumped from cable systems, displaced as to their favorable tier position or, at the very least, packaged with less desirable leased programming which has not otherwise justified carriage among competitive program services. Cable subscribers will not ignore this very different programming landscape. The Commission's proposed rate methodology takes none of these consequences into account and, thus, must be rejected.

Finally, while the Commission's effort at a transition period to soften the enormous harm to existing program services is to be commended, MPAA submits that it is not sufficient to propose a "gradual" transition to the new rate formula that will simply stagger the bumping of existing services from cable systems. If, contrary to MPAA's arguments, significant revisions are made to the current leased access formula, the FCC must exercise its authority to prevent the abrogation of existing programming contracts as well to protect those programmers currently carried on cable systems from being bumped from cable systems or otherwise given less preferred tier status as a result of the increased demand for leased access from such a significant departure from its current access rates.[6]

[6]Section 612(c)(4)(A)(ii), in conjunction with authorizing the Commission to establish reasonable leased rates, provides the agency with the ability to impose reasonable terms and conditions on channel lessees utilizing leased access rates established by the government rather than the private sector. The protection of existing program services on a cable system would clearly come within the Commission's authority.

CONCLUSION

For the reasons stated above, MPAA respectfully requests the Commission to not adopt the proposed methodology set forth in the Further Notice but to maintain the fundamental principles of the existing formula as the most appropriate surrogate for the value of leased access capacity. Furthermore, MPAA urges the Commission to avoid displacement and disruption to existing programmer relationships with cable operators and with the programming preferences of consumers in the current competitive programming marketplace.

Respectfully submitted,

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

By: ______________________

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